CHARACTER EVIDENCE AND SEX CRIMES IN ALABAMA: MOVING TOWARD THE ADOPTION OF NEW FEDERAL RULES 413, 414 & 415

I. INTRODUCTION

Under our system of criminal justice, "[i]t is axiomatic that the defendant need answer only for the crime he or she is currently charged with."[1] In the area of evidence law, this policy is reflected in the general prohibition against the introduction of collateral misconduct for the sole purpose of establishing a defendant's criminal predisposition.[2] By way of example, suppose a criminal defendant is charged with armed robbery. The "general exclusionary rule" of character would preclude the prosecution from introducing evidence of the accused's alleged collateral thefts or robberies if the only probative value of such evidence were to show the defendant's violent character or propensity to commit the currently charged crime.[3]

In both the Federal and Alabama Rules of Evidence, this fundamental proposition is codified as Rule 404(a) which, subject to enumerated exceptions, provides that "[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."[4] As clearly indicated by Rule 404(a), however, character evidence is not per se inadmissible. To the contrary, character evidence is prohibited only when offered for the improper purpose, i.e., as circumstantial evidence from which the trier of fact is to infer the accused is more likely to be guilty of the crime charged.[5] This "gap" in the general exclusionary rule has

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1. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03 (1984 & Supp. 1995).

2. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 404.12[3] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997).

3. *Id.* § 404.12[3].

4. FED. R. EVID. 404(a); ALA. R. EVID. 404(a).

5. *See* CHARLES W. GAMBLE, CHARACTER EVIDENCE: A COMPREHENSIVE APPROACH 36 (1987); FED. R. EVID. 404(b).

"opened the door" for character evidence to be proffered for some purpose other than to merely show poor character and conformity therewith.[6] With respect to the medium of prior specific acts, this "other purpose" or non-conformity doctrine is codified as Rule 404(b), which reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[7]

Recall the illustration of a criminal defendant charged with armed robbery. Although the prosecution could not offer uncharged misconduct for the purpose of proving the defendant's criminal disposition, the same collateral misconduct evidence could be offered, pursuant to Rule 404(b), for some "other purpose." For instance, assuming the dual requirements of materiality and relevancy were satisfied, the defendant's prior "bad acts" could be introduced to prove his "motive" or "plan" for committing the robbery.[8]

Although the general exclusionary rule of character is one of the bedrock principles of American evidence law, there have been recent calls for its relaxation or abolition, especially in the prosecution of sexual offenders.[9] This partial repeal of the character prohibition apparently began by courts simply taking a more liberal approach to the "other purposes" of plan and scheme when sexual misconduct was at issue.[10] However, as hostility towards sexual offenders increased, some courts took a more drastic step and created a special case law exception to the general exclusionary rule. This exception, often referred to as a "lewd" or "lustful dispensation" exception, allows the prosecution to introduce collateral acts of similar sexual misconduct in order

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6. GAMBLE, *supra* note 5, at 36.

7. FED. R. EVID. 404(b); ALA. R. EVID. 404(b). While Rule 404(b) is applicable in both criminal and civil cases, this Note will only address the rule in the criminal context.

8. FED. R. EVID. 404(b); ALA. R. EVID. 404(b).

9. Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 286 (1995).

10. GAMBLE, *supra* note 5, at 45-46.

to prove a defendant's propensity to commit sexual offenses.[11]

The "war" against sex offenders reached a pinnacle in the mid 1980s and early 1990s when the mass media brought unprecedented attention to the subject by flooding the public with tragic stories of innocent children who were attacked by a neighborhood molester.[12] In response to the public's cry for action, state and federal public officials lobbied for stringent sex offender legislation.[13] At the federal level, pursuant to the Violent Crime Control and Law Enforcement Act of 1994,[14] Congress promulgated Rules 413, 414 and 415 of the Federal Rules of Evidence. The new rules, which became effective on July 9, 1995, supersede Rule 404(b)'s prohibition against the introduction of propensity evidence in cases concerning child molestation and sexual assault.[15]

In 1994, the same year that Congress promulgated the new Federal Rules, the Alabama Supreme Court began liberalizing the admissibility of collateral misconduct evidence in sex crime prosecutions.[16] While steadfastly maintaining that Alabama has never recognized a special exception for an accused's "lustful dispensation,"[17] the Alabama Supreme Court essentially reaches an identical result by allowing collateral acts of sexual misconduct to be admitted under the subterfuge of "motive."[18] This

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11. IMWINKELRIED, *supra* note 1, § 4:15.

12. *See* DOUGLAS W. PRYOR, UNSPEAKABLE ACTS 2-5 (1996).

13. Joseph A. Aluise, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153, 155 (1998).

14. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(c), 108 Stat. 1796, 2135 (codified at 42 U.S.C. §§ 13701-14223 (1994)).

15. FED. R. EVID. 413, 414 & 415; *see also* WEINSTEIN & BERGER, *supra* note 2, § 404.10[1].

16. *See Ex parte* Register, 680 So. 2d 225, 227 (Ala. 1994) (quoting William A. Schroeder, *Evidentiary Use in Criminal Cases of Collateral Crimes and Acts: A Comparison of the Federal Rules and Alabama Law*, 35 ALA. L. REV. 241, 265-66 (1984) for the proposition that "courts seem more willing to admit evidence of collateral acts when sex crimes are involved"); *see also* Hatcher v. State, 646 So. 2d 676 (Ala. 1994) (holding that, in the prosecution of sexual offenses, the introduction of collateral misconduct in order to establish the defendant's "motive" is not limited to cases involving incest).

17. Bowden v. State, 538 So. 2d 1226 (Ala. 1988).

18. *See* Campbell v. State, 718 So. 2d 123, 131 (Ala. Crim. App. 1997), *cert. denied* 119 S. Ct. 522 (1998); Estes v. State, No. CR-98-0677, 1999 WL 1128991, at *3 (Ala. Crim. App. 1999).

interpretation of the "motive" doctrine in cases involving similar, collateral sexual misconduct is awkward and confusing, conflicts with the mainstream interpretation of Rule 404(b), and renders a defendant's right to a Rule 105 limiting instruction meaningless.

This Note traces the historical foundations of the general exclusionary rule of character evidence as well as the permissible "other purposes" that have evolved along with that rule. This Note then discusses the various methods that courts, particularly the Alabama Supreme Court, have employed in attempts to relax or abolish the general exclusionary rule in sexual offense prosecutions. Finally, after critiquing the purpose and rationale of the new Federal Rules of Evidence, this Note urges the State of Alabama to yield to "intellectual honesty" and adopt the straightforward federal approach.

II. HISTORICAL PROHIBITIONS AGAINST TRIAL BY CHARACTER

A. Common Law

For at least two centuries, American common law jurisprudence has reflected a general prohibition against the introduction of collateral misconduct in order to prove the accused's guilt, character or propensity to commit crime.[19] This general exclusionary rule of character, originating in English common law and subsequently adopted in American jurisdictions, reflects the fundamental belief that "a defendant should be tried for what he did, not for who he is."[20] Since its early inception, both courts and commentators have celebrated the general

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19. 1A WIGMORE ON EVIDENCE § 58.1 (Tillers rev. 1983). Many commentators attribute the 1810 opinion of Rex v. Cole as the source of the character evidence prohibition. *Cole* established that "it would not be allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offense as charged against him." David P. Leonard, *In Defense of the Character Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1168 (1998) (quoting SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 70 n.b. (London, J. Butterworth & Son, 1814)).

20. United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977); *see* Renee Lieux, *The Michigan Pig Farm Perception: The Michigan Supreme Court Continues to Ignore The Opportunity to Create a Lustful Disposition Exception to Michigan Rule of Evidence 404(B)*, 76 U. DET. MERCY L. REV. 127, 128 (1998).

exclusionary rule as a unique feature of American common law jurisprudence. For instance, Professor Wigmore characterized the rule as "a revolution in the theory of criminal trials and is one of the pecular [sic] features, of vast movement, that distinguishes the Anglo-American from the Continental system of evidence."[21] Although a variety of explanations have been given for this general prohibition against utilizing character evidence to show conformity,[22] it appears that the basis for the exclusion is not grounded in a belief that the evidence is irrelevant, but rather in a fear that the dangers of unfair prejudice, confusion and waste of time far outweigh any probative value that the evidence may have.[23]

The common law exclusionary rule of character, however, has never been absolute. Instead, "other purposes" have developed along with the rule which permit the introduction of collateral acts of misconduct for logically relevant purposes other than merely proving a defendant's bad character and conformity therewith.[24] An early illustration of this principle is provided by the 1804 decision of *Rex v. Whiley*.[25] In *Rex*, the defendants were essentially charged with knowingly offering forged bank notes.[26] To establish the element of knowledge, the prosecution offered three uncharged collateral acts of similar misconduct.[27]

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21. WIGMORE, *supra* note 19, § 58.2; *see* People v. Molineux, 61 N.E. 286 (N.Y. 1901) stating that:

> the [general exclusionary] rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common-law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.

22. *See generally* WIGMORE, *supra* note 19, § 54.1.

23. *Id.* § 58.2; *see* Michelson v. United States, 335 U.S. 469, 475-76 (1948) (holding that the inquiry into character "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").

24. *See* GAMBLE, *supra* note 5, at 36.

25. Leonard, *supra* note 19, at 1174 (citing Rex v. Whiley, 168 Eng. Rep. 589 (Old Bailey, London 1804)).

26. *Id.*

27. *Id.*

Rejecting the defendants' fairness claim, the court stated that "without the reception of other [uncharged] evidence . . . it would be impossible to ascertain whether it was uttered under circumstances which shewed their minds to be free from that guilt."[28]

During the early nineteenth century, building on the foundation laid by decisions such as *Rex,* corresponding "other purposes" for which character evidence could be offered slowly began to take their place alongside the historically rigid general exclusionary rule.[29] Therefore, while it was perfectly clear that collateral acts evidence could not be admitted for the sole purpose of showing character and conformity therewith, it now became equally apparent that the same evidence would be perfectly admissible for logically relevant *non-conformity* purposes.[30] Although courts were initially restrictive in their application of this non-conformity doctrine, as the nineteenth century progressed, both the number of cases admitting collateral misconduct and the number of "other purposes" for which collateral misconduct could be offered increased dramatically.[31]

With the 1901 decision in *People v. Molineux,*[32] the classic list of "other purposes" for which character evidence could be offered became firmly embedded in American common law jurisprudence. In *Molineux*, the defendant was indicted for the poisoning death of a young woman.[33] During trial, the prosecution successfully offered evidence of similar uncharged poisonings allegedly committed by the defendant.[34] The New York Court of Appeals unanimously held that the collateral misconduct evidence violated the general exclusionary rule. Nevertheless, the court acknowledged that the uncharged poisonings may be admissible as "exceptions" to the general exclusionary rule if relevant to establish the accused's "motive," "intent," "the absence of mistake or accident," a "common plan or scheme," or the

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28. *Id.*

29. *Id.* at 1175.

30. Leonard, *supra* note 19, at 1175.

31. *United States Department of Justice Office of Legal Policy Reports*, 22 U. MICH. J.L. REF. 707-16 (1989) (citing the Office of Legal Policy, Report to the Attorney General on the Admission of Criminal Histories at Trial).

32. 61 N.E. 286 (N.Y. 1901).

33. *Molineux*, 61 N.E. at 286-87.

34. *Id.* at 291.

accused's "identity."[35]

While *Molineux* represented a monumental step in expanding the "other purposes" or non-conformity doctrine, the court's reference to the "other purposes" as "exceptions" to general exclusionary rule caused both controversy and confusion. First, as evidenced by cases such as *Rex*, courts historically treated the "other purposes" as "inclusionary;" thus, "they rejected [evidence of collateral] misconduct offered to prove the defendant's character but were content with *any other theory of logical relevance*."[36] However, because the *Molineux* court used to the term "exception" when referring to the "other purposes" doctrine, several courts and commentators began to lose sight of the original rule and construed the decision to establish a general exclusionary rule with a fixed number of "exceptions."[37] Under this "exclusionary" approach, even if the collateral misconduct was offered for a material and relevant "other purpose," the evidence would promptly be excluded if that purpose was not recognized as one of the enumerated "exceptions" to the general exclusionary rule. This "exclusionary" approach to the "other purpose" doctrine was widely endorsed during the early Twentieth century and ultimately became the approach of a majority of American jurisdictions,[38] including Alabama.[39]

The "inclusionary" approach resurfaced, however, with the adoption of the Federal Rules of Evidence in 1975.[40] In fact, due to the widespread adoption of state evidence codes modeled after the Federal Rules, continued reference to the "other purposes" as "exceptions" to the general exclusionary rule blurs the distinction between the "inclusionary" and "exclusionary" doctrines. Strictly speaking, under Federal and Alabama Rule 404(b), the "other purposes" for which character evidence may

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35. *Id.* at 293.

36. IMWINKELRIED, *supra* note 1, § 2:25 (emphasis added).

37. *Id.* A careful reading of *Molineux* indicates that Judge Werner did not expressly mandate an exclusionary approach. *Id.*

38. *See* Lieux, *supra* note 20, at 130.

39. *See* Brasher v. State, 30 So. 2d 31, 33 (Ala. 1947) (stating that evidence of other crimes is prima facie inadmissible and thus suggesting that the Alabama Rule was exclusionary in contrast to Federal Rule 404(b)).

40. *See* IMWINKELRIED, *supra* note 1, § 2:29 (stating that, "[o]n its face," Rule 404(b) "is vintage inclusionary approach"); *see also* FED. R. EVID. 404(b); ALA. R. EVID. 404(b).

permissibly be offered, such as proof of "motive" or "knowledge," are not true "exceptions" to the general rule; instead, they are non-conformity theories of logical relevancy. In other words, evidence tending to show one's "motive" cannot be considered an "exception" to the general exclusionary rule because the evidence is not being offered for the prohibited purpose; instead, it is offered for *another purpose*—to show his or her motivation.

B. Federal Rules of Evidence

Congress promulgated the Federal Rules of Evidence in 1975, codifying the common law prohibition against trial by character in Rule 404(a) and (b). Consistent with its common law predecessor, Rule 404(b) does not work to exclude evidence of all collateral crimes or acts; rather, it only excludes those offered to show the defendant's bad character and that he or she conformed with that bad character and therefore committed the crime in the pending prosecution.[41] The permissible "other purposes" for which collateral acts evidence may be offered is best articulated by Rule 404(b) itself, which reads: "[Character evidence] may [ ] be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[42] Of course, identifying a non-conformity theory of logical relevancy does not guarantee the proponent *carte blanche* admissibility. Rather, the "other purposes" for which the evidence is offered must be relevant to some material issue in the case, and its probative value must not be outweighed by its prejudicial effect.[43]

At first blush, the "other purposes" listed in 404(b) appear virtually identical to the common law "exceptions" articulated in *Molineux*. However, as previously mentioned, unlike the "exclusionary" or "close listed" common law approach, commentators agree that the "such as" language of 404(b) indicates that the list of "other purposes" for which uncharged misconduct may be introduced is not limited or exhaustive.[44] Instead, coined as

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41. *See* CHARLES W. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 69.01(1) (5th ed. 1996).

42. FED. R. EVID. 404(b).

43. FED. R. EVID. 401, 403.

44. GAMBLE, *supra* note 41, § 69.01(1); *see* United States v. Diggs, 649 F.2d 731,

"inclusionary,"[45] the 404(b) list of "other purposes" merely represent illustrations of theories of logical relevancy rather than finite "exceptions" to the general exclusionary rule.[46] Therefore, under the Federal Rules, evidence of collateral misconduct is admissible for any purpose other than to show a propensity to commit the charged crime, even if that purpose is not included in the "laundry list" of examples provided in 404(b).[47] In fact, as stated by Professor Gamble, the proper purposes for which character evidence may permissibly be offered "are limited only by such doctrines as materiality, relevancy and unfair prejudice."[48]

C. Alabama Law

Alabama, perhaps best described as a "Molineux state"[49] at common law, consistently adhered to the traditional application of the general exclusionary rule as well as the recognized "other purposes" that evolved along with that rule.[50] On January 1, 1996, when the Alabama Rules of Evidence became effective, the general exclusionary rule was codified as Rule 404(a) and (b). Identical to its federal predecessor, Rule 404(b) of the Alabama Rules of Evidence prohibits the prosecution from introducing collateral acts of misconduct for the sole purpose of suggesting that the accused is more likely to be guilty of the crime charged.[51] Likewise, Alabama Rule 404(b) does not exclude all

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737 (9th Cir. 1981) (stating "Rule 404(b) is an inclusionary rule—i.e., evidence of other crimes is inadmissible under this rule only when it proves nothing but the defendant's criminal propensities").

45. *United States Department of Justice Office of Legal Policy Reports*, *supra* note 31, at 719.

46. IMWINKELRIED, *supra* note 1, § 2:30; GAMBLE, *supra* note 41, § 69.01. For a historical discussion of the "inclusionary" doctrine, see Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

47. *See* United States v. Moore, 732 F.2d 983, 987 (D.C. Cir. 1984); *see also* United States v. Long, 574 F.2d 761, 765-66 (3d Cir. 1978).

48. *See* GAMBLE, *supra* note 41, § 69.01(1).

49. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 196 (1993).

50. *See* Weatherspoon v. State, 56 So .2d 793 (Ala. 1952); Lee v. State, 18 So. 2d 706 (Ala. 1944); Johnson v. State, 5 So. 2d 632 (Ala. 1941); Haley v. State, 1879 WL 949 (Ala. 1879); Ingram v. State, 1864 WL 489 (Ala. 1864); *see also* William A. Schroeder, *Evidentiary Use in Criminal Cases of Collateral Crimes and Acts: A Comparsion of the Federal Rules and Alabama Law*, 35 ALA. L. REV. 241 (1984).

51. ALA. R. EVID. 404(a); GAMBLE, *supra* note 41, § 69.01(1); SCHROEDER,

collateral acts of misconduct; rather, 404(b) only excludes those collateral acts offered to show a defendant's bad character, that he or she conformed with that bad character, and that he or she therefore committed the crime in question.[52] Even if offered for some "other purpose," however, such evidence must be relevant to a material issue in the case, and its probative value must not be outweighed by its prejudicial effect.[53] Prior to the adoption of the Alabama rules, confusion existed as to whether Alabama followed an "exclusionary" or "inclusionary" approach to the "other purposes" doctrine.[54] However, the "such as" language of new Rule 404(b) "makes it clear that the list of [other] purposes . . . is not fixed or exhaustive."[55]

III. The Admission of Collateral Acts of Misconduct in Cases of Sexual Misconduct: An Exception to the General Exclusionary Rule

In the lion's share of cases in which the general exclusionary rule is invoked, the proponent of the evidence has essentially two ways to circumvent the character exclusion. First, the proponent could argue that the purpose for which he or she is offering the evidence falls under a recognized special exception to the general exclusionary rule.[56] If the jurisdiction recognizes such an exception, a judge should allow the admission of the character evidence for the otherwise prohibited purpose of showing character and conformity therewith.[57] Conversely, if the special exception is not recognized, a judge should declare the evidence inadmissible. Second, even if a special exception is not recognized, a prosecutor could argue that the col-

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Hoffman and Thigpen, Alabama Evidence § 4-4(a) (1987); *Brasher*, 30 So. 2d at 31 (discussing the applicability of the general exclusionary rule in Alabama).

52. Gamble, *supra* note 41, § 69.01(1).

53. Ala. R. Evid. 402, 403.

54. *See Brasher*, 30 So. 2d at 31.

55. Gamble, *supra* note 41, § 69.01(1) n.12.

56. *See* Imwinkelried, *supra* note 1, § 4:12.

57. Under the Alabama Rules of Evidence, for example, there are three such exceptions to the general exclusionary rule: (1) evidence of a pertinent character trait offered by an accused; (2) evidence of a pertinent trait of character of the victim of crime offered by an accused; and (3) evidence of the character of a witness as provided in rules 607, 609 and 609. *See* Ala. R. Evid. 404(a)(1)-(3).

lateral misconduct is not being offered to prove bad character and conformity therewith; instead, he or she may argue that the evidence is being offered pursuant to a non-conformity theory of logical relevancy such as "motive" or "plan."[58] If the evidence is offered under a non-conformity theory, a judge simply determines whether that particular theory is material, relevant and not unduly prejudicial. If so, then the judge should allow the admission of the collateral evidence for the limited relevant purpose(s) for which it is offered and, if requested, instruct the jury accordingly.[59] If a non-conformity theory of logical relevancy cannot be identified, the character evidence should be excluded.

A. Common Law

1. Liberal Application of the "Other Purpose" Doctrine.—As pointed out in Section II of this Note, a majority of common law courts followed an "exclusionary" approach to the "other purposes" doctrine.[60] Therefore, if the offering party could not "squeeze" the character evidence into at least one of the non-conformity theories of logical relevancy, such evidence would be promptly excluded. In the prosecution of certain crimes, particularly sexual offenses, courts following the "exclusionary" approach soon realized that highly probative collateral sex offenses may not necessarily fit into one of the ascertainable non-conformity categories. Moreover, taking into consideration the often overwhelming need for such evidence, especially when the victims were children, these jurisdictions desperately searched for some type of evidence, beyond the child's accusations, that would prove that the defendant committed the act in question.[61] Confronted with this dilemma, several courts chose to effect a more expansive interpretation of the "other purposes"

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58. *See* IMWINKELRIED, *supra* note 1, § 4:12.

59. *Id.*; *see also* FED. R. EVID. 105; ALA. R. EVID. 105.

60. *See supra* text accompanying notes 36-39.

61. 22 CHARLES ALLEN WRIGHT AND KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5239 (2d ed. 1987). The secrecy of the act, the vulnerability of victims, the absence of physical proof, the unwillingness of witnesses to testify, and the difficulty in assessing the credibility of child witnesses all contribute to the extraordinary need for collateral acts evidence in sexual offense prosecutions. *Id.*

doctrine when sexual misconduct was at issue.[62] In *Elliot v. State*,[63] for example, the defendant was prosecuted for second degree sexual assault for forcibly raping his nine-year-old stepdaughter.[64] Over objection of defense counsel, the prosecution offered the testimony of the victim's older sister alleging similar attempted assaults.[65] While stating that "Wyoming unquestionably is committed to the general rule that evidence of other crimes . . . normally is not admissible in the trial of a criminal case," the Wyoming Supreme Court held that the collateral misconduct evidence was admissible to establish the defendant's "motive."[66] Notably, the court's description of the defendant's motive, "preference or addiction for unusual sexual practices," is essentially synonymous with prohibited propensity evidence.[67] The *Elliot* case is not an anomaly; instead, a mounting line of case law indicates that courts have consistently used the rubric "plan," "scheme" or "motive" as a ploy for admitting similar incidences of a defendant's sexual misconduct.[68] However, as noted by Professor Wigmore, "such rationales are often fiction rather than fact."[69]

2. "Lustful Dispensation" Exception.—While several jurisdictions have habitually expanded and distorted the "other purposes" doctrine in attempts to rationalize the admission of uncharged sexual misconduct, other courts have yielded to "intellectual honesty" and recognized that they were actually creating a special exception to the general exclusionary rule.[70] Therefore, instead of manipulating the normal non-conformity theories

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62. *See* IMWINKELRIED, *supra* note 1, §§ 4:11-4:18; *see also* WIGMORE, *supra* note 19, § 62.2.

63. 600 P.2d 1044 (Wyo. 1979).

64. *Elliot*, 600 P.2d at 1044.

65. *Id.* at 1046.

66. *Id.* at 1049.

67. *Id.*

68. *See* IMWINKELRIED, *supra* note 1, §§ 4:11-4:18; CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 190 (Edward W. Cleary ed., 3d ed. 1984); *see* State v. Everett, 390 S.E.2d 160, 163 (N.C. Ct. App. 1990), *rev'd on other grounds*, 393 S.E.2d 305 (N.C. 1991); Findley v. State, 577 P.2d 867 (Nev. 1978); State v. Schlak, 111 N.W.2d 289, 291 (Iowa 1961).

69. WIGMORE, *supra* note 19, § 62.2.

70. *See* IMWINKELRIED, *supra* note 1, § 4:14; *see also* GAMBLE, *supra* note 5, at 46.

of logical relevancy, such as "motive" or "plan," these jurisdictions created a true exception to the exclusionary rule, thereby allowing a prosecutor to present evidence of collateral misconduct in order to prove a defendant's propensity to commit sexual offenses.[71] The justification for this "lewd" or "lustful dispensation" exception is twofold: (1) the absence of direct proof in sexual offense prosecutions and (2) the high probative value of sexual misconduct evidence.[72] The breadth of the "lewd" or "lustful" exception tends to vary from jurisdiction to jurisdiction. For instance, while some courts restrict the scope of the exception to the defendant's predisposition for abnormal or unnatural sexual misconduct, other courts have expanded the exception to include non-deviant sexual misconduct such as adultery and heterosexual rape.[73] Similarly, some courts only allow the admission of prior sexual acts against the complainant, while other courts have construed the exception broadly to admit similar acts of misconduct aimed at third parties.[74] According to a recent survey, twenty-seven states and the District of Columbia currently recognize some form of the lustful dispensation exception.[75]

B. Federal Rules of Evidence

Because common law jurisdictions often use the term "exception" when referring to non-conformity theories of relevancy such as "motive" or "intent," it is often difficult to determine whether those jurisdictions are liberalizing the "other purposes" doctrine or actually recognizing a "special exception" to the gen-

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71. *See* IMWINKELRIED, *supra* note 1, § 4:14.

72. *See id.* For criticisms of the "lewd" or "lustful" dispensation see IMWINKELRIED, *supra* note 1, § 4:16; Reed, *supra* note 49, at 154. (questioning recidivism rates); People v. Thornton, 523 P.2d 267 (Cal. 1974).

73. *See* IMWINKELRIED, *supra* note 1, § 4:15. Proponents of expanding the exception to include any evidence of the defendant's disposition for sexual misconduct have argued that the justifications for the exception apply to sexual misconduct in general. *Id.*

74. *See id.* A majority of jurisdictions that have broadened the special exception to encompass non-deviant sexual behavior have declined to extend the exception to include third parties. *Id.*

75. Heather E. Marsden, State v. Hopkins: *The Stripping of Rhode Island Rule of Evidence 404(b) Protections From Accused Sexual Offenders*, 3 ROGER WILLIAMS U.L. REV. 333, 344 (1998).

eral exclusionary rule. The Federal Rules ameliorate this confusion by codifying the general exclusionary rule in two different subsections of Rule 404. Rule 404(a), subject to three "special exceptions," provides that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."[76] Although the first sentence of Rule 404(b) repeats Rule 404(a), the remaining portion of the subsection (b) provides a non-exclusive list of permissible non-conformity purposes for which collateral misconduct may be offered.[77] Furthermore, as clearly indicated by the exceptions to Rule 404(a), at least until the adoption of Rules 413, 414 and 415, the Federal Rules of Evidence have never recognized a "lewd" or "lustful dispensation" exception to the general exclusionary rule.[78] However, a few circuits, apparently influenced by the common law analysis, have taken a more expansive interpretation of the "other purposes" doctrine in sexual offense prosecutions.[79]

The Eighth Circuit's decision of *United States v. Yellow*[80] provides an excellent illustration of the federal court liberalization of Rule 404(b). In *Yellow*, the defendant appealed the lower court's decision to admit into evidence collateral acts of sexual abuse against his brother and sister that occurred prior to the sexual assaults for which he was being prosecuted.[81] Upholding the admission of the collateral acts evidence, the Eighth Circuit stated as a "general rule that evidence of prior sex offenses committed upon the victim of the charged offense is relevant and admissible at trial."[82] Recognizing that the "general rule" exceeds the limiting language of Rule 404(b), the court casually remarked that "federal courts have consistently held that such

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76. FED. R. EVID. 404(a).

77. FED. R. EVID. 404(b); *see also* discussion *infra* Part II.

78. FED. R. EVID. 404(a); Sarah B. Colley, *New Mexico Rejects The "Lewd and Lascivious" Exception to Rule 404(B):* State v. Lucero, 24 N.M. L. REV. 427, 428 (1994). Several commentators have asserted that a "lustful dispensation" exception cannot survive the adoption of the Federal Rules because it is essentially at odds with a plain reading of Rule 404(b). *See e.g.*, IMWINKELRIED, *supra* note 1, § 4:18.

79. *See* United States v. Hadley, 918 F.2d 848 (9th Cir. 1990); United States v. Yellow, 18 F.3d 1438 (8th Cir. 1994); Colley, *supra* note 78, at 428.

80. *Yellow*, 18 F.3d at 1438.

81. *Id.*

82. *Id.* at 1440 (citing MCCORMICK, *supra* note 68, § 190(4)).

evidence is relevant under one or more of the permissible purposes enumerated in the Rule."[83] In *Yellow*, the court determined that the collateral acts of sexual misconduct were relevant to the defendant's "intent" to commit the assault.[84]

C. Alabama Law

Although Alabama courts have never explicitly recognized a "lustful dispensation" exception to the general exclusionary rule of character, they have traditionally liberalized the application of the "intent" and "identity" doctrines in order to accommodate the admission of collateral sexual misconduct evidence.[85] Additionally, when collateral acts of sexual misconduct were committed against the victim in the pending prosecution, Alabama courts have consistently held that such evidence is admissible to show the "relation and intimacy of the parties."[86] However, since the mid-1980s, the Alabama Supreme Court's analysis of the admissibility of sexual misconduct evidence has become less predictable. As the following cases illustrate, over the course of the past ten years, Alabama Supreme Court decisions have varied from initially abandoning the special treatment of sexual misconduct evidence under the doctrines of "intent" and "identity," to liberally admitting such evidence under the guise of "motive."

1. Anonymous & Bowden.—In 1987 and 1988, respectively, the Alabama Supreme Court's decisions in *Anonymous v.*

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83. *Id.* 18 F.3d at 1440.

84. *Id.* While the court in *Yellow* indicated its reluctance to approve the admission of prior acts evidence committed against third persons, other circuits have not been so hesitant. *See, e.g.*, United States v. Hadley, 918 F.2d 848, 851 (9th Cir. 1990) (admitting prior acts against a third person to prove a specific intent to gratify the defendant's sexual desires).

85. Wilkens v. State, 197 So. 75, 78 (Ala. Crim. App. 1940); Johnson v. State, 5 So. 2d 632 (Ala. 1941); Lee v. State, 18 So. 2d 706 (Ala. 1944). However, subsequent cases limited the expansive rule of admissibility by requiring collateral evidence to possess some relevancy other than to merely showing disposition or propensity. *See Brasher*, 30 So. 2d at 33-35; Noble v. State, 45 So. 2d 857, 859-60 (Ala. 1950).

86. Harrsion v. State, 178 So. 458, 459 (Ala. 1937); Lawson & Swinney v. State, 20 Ala. 65 (Ala. 1852); *Brasher*, 30 So. 2d at 33. *See* Schroeder, *supra* note 50, at 265 (referring to this "exception" to the general exclusionary rule as more of an "amalgam of several exceptions than a separate and distinct exception on its own").

State[87] and *Bowden v. State*[88] arguably eliminated the liberal treatment of collateral sexual misconduct evidence, returning Alabama to a point where its "other purposes" doctrine is applied uniformly regardless of the charged crime.[89] In *Anonymous*, the defendant was convicted of forcible rape and incest against his daughter.[90] Over defense counsel's objection, both the victim and her sister testified that the defendant had sexually abused them for several years, resulting in pregnancies and coerced abortions.[91] On appeal, the Court of Criminal Appeals upheld the admission of the defendant's collateral sexual mistreatment as relevant to prove the "other purposes" of "intent" and "identity."[92] The Alabama Supreme Court disagreed, concluding that the collateral misconduct evidence should have been excluded because "identity" and "intent," the "other purposes" for which the evidence was offered, were simply not at issue in the case.[93] This narrow interpretation of "intent" and "identity" raised serious doubt as to whether, in the prosecution of sexual offenses, the traditional liberal application of the "other purposes" doctrine was still practicable.[94] Moreover, the Court's dicta, implying that "intent" and "identity" were the *only* applicable "other purposes" for which collateral sexual misconduct could be offered, exacerbated the confusion and uncertainty.[95]

Approximately two years after *Anonymous* was decided, 2primarily due to the confusion induced by the decision, the Alabama Supreme Court consolidated the cases of *Bowden v.*

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87. 507 So. 2d 972 (Ala. 1987).

88. 538 So. 2d 1226 (Ala. 1988).

89. *See* Suzanne Alldredge, *After Anonymous and Bowden: The Status of Alabama's Other Purpose Doctrine in Sex Crime Prosecutions*, 42 ALA. L. REV. 1351, 1352 (1991).

90. *Anonymous*, 507 So. 2d 972.

91. *Id.* at 972-73.

92. Grizzell v. State, 507 So. 2d 969 (Ala. Crim. App. 1986) (declining to drop the defendant's name and to restyle the case as *Anonymous v. State*).

93. *Grizzell*, 507 So. 2d at 975. The court stated that in order for collateral acts evidence to be admissible under the "identity" exception, there must be a "real and open" issue concerning identity. *Id.*

94. *See* Watson v. State, 538 So. 2d 1216, 1223 (Ala. Crim. App. 1987).

95. *Anonymous*, 507 So. 2d at 975. The court stated that "[b]ecause the asserted exceptions of 'intent' and 'identity' are not applicable to this case, one cannot escape the conclusion that there exists no exception upon which the admissibility of the testimony concerning the prior sexual mistreatment of the defendant's daughters could be based." *Id.*

State[96] and *Watson v. State*[97] for appeal. *Bowden* and *Watson* both involved the conviction of a defendant-father for the forcible rape of his minor daughter.[98] During their respective trials, over defense counsel objection, collateral acts of sexual misconduct committed against the victims, as well as their siblings, were introduced into evidence.[99] Relying on the precedent set in *Anonymous*, the Court of Criminal Appeals in *Bowden* held the collateral testimony inadmissible since there was no real issue as to the defendant's "identity" or "intent."[100] However, in *Watson*, the Court of Criminal Appeals reasoned that because the victim was undisputedly nine months pregnant after the rape and because the defendant denied being present on the night of conception, a "real and open" issue existed as to the rapist's "identity."[101] In addition to rendering its decision in *Waston*, "in the interests of judicial economy," the Court of Criminal Appeals addressed the apparent overruling effect that *Anonymous* had on the "other purposes" traditionally recognized in sex crime prosecutions.[102] In particular, the court opined that the *only* viable "other purposes" remaining after *Anonymous* were "intent" and "identity."[103]

Based on the Court of Criminal Appeals' commentary, the Alabama Supreme Court sought to conduct a "re-examination of the *Anonymous* decision."[104] First and foremost, the Alabama Supreme Court made it very clear that "there is no longer any basis for the view that, in the prosecution of sex crimes, the Alabama courts will be more liberal in their extensions of the

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96. 538 So. 2d 1224 (Ala. Crim. App. 1987).
97. 538 So. 2d 1216 (Ala. Crim. App. 1987).
98. Bowden v. State, 538 So. 2d 1226 (Ala. 1989).
99. *Bowden*, 538 So. 2d at 1228-29.
100. *Id.* at 1226.
101. Although the uncanny similarity between the rape and the alleged collateral acts of misconduct would seem to fit even the narrowest definition of "identity," the Court of Appeals discussed in great detail the traditional liberal approach to the "identity" exception in prosecutions of sexual offenders. In such prosecutions, the court asserted, "courts seem to allow proof of other similar crimes by the accused if they, in any way, go to identify him as the person who committed the now-charged crime." *Watson*, 538 So. 2d at 1221 (quoting C. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 70.01(22)(b) (3d. ed. 1977)).
102. *Id.* at 1223.
103. *See id.* at 1222-23; *see also Bowden*, 538 So. 2d at 1232.
104. *Bowden*, 538 So. 2d at 1232.

exceptions to the general rule of exclusion."[105] However, the court also pointed out that the permissible "other purposes" for which character evidence may be offered should not be interpreted more narrowly in sex prosecutions; instead, "[t]he same factors for determining the admissibility of collateral acts of misconduct by the accused in other types of prosecutions are to be applied in determining the admissibility of collateral acts of *sexual* misconduct in the prosecution of *sex crimes*."[106] While acknowledging that the "modern trend"[107] favors an exception to the general exclusionary rule of character and allows the prosecution to prove that the accused has a "*propensity* to commit the sex crime for which he is charged,"[108] the court accurately pointed out that Alabama has never recognized such an exception.[109] However, in response to the assertion that Alabama has traditionally effected an expansive interpretation of "intent" and "identity" in sex crime prosecutions, the court took the position, albeit an unpersuasive one, that the "other purposes" are "peculiarly applicable in prosecutions for sexual offenses."[110] After clarifying the scope of the general exclusionary rule, as well as its interpretation of *Anonymous*, the Alabama Supreme Court affirmed the rulings in both *Bowden* and *Watson*.[111] In *Watson*, the Alabama Supreme Court agreed with the lower court in that, unlike the situation in *Anonymous*, there was a "real and open issue" as to the rapist's identity.[112] Similarly, in *Bowden*, the court held that the defendant's "identity" was not an issue in the case and the State had failed to demonstrate any other viable purpose for which the collateral evidence could be offered.[113]

More interesting than the resolutions of *Bowden* and *Watson*, however, is the Alabama Supreme Court's detailed analysis

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105. *Id.* (citing *Anonymous* and *Ex parte* Cofer, 440 So. 2d 1121 (Ala. 1983)).

106. *Id.* at 1233 (emphasis in original).

107. *Id.*

108. *Bowden*, 538 So. 2d at 1233 (emphasis in original).

109. *Id.* at 1232-33.

110. *Id.* at 1233 (quoting *Annotation, Admissibility, in prosecution for sexual offense, of evidence of other similar offenses*, 77 A.L.R.2d 841, 848-49 (1961) (emphasis omitted)).

111. *Id.* at 1238.

112. *Id.* at 1234.

113. *Bowden*, 538 So. 2d at 1238.

of the specific issues raised on appeal. The first issue addressed 1was whether collateral acts of sexual mistreatment *involving the same victim of the currently charged crime* should be admissible in evidence.[114] The court suggested that the accused's "motive," interestingly described as his or her "sexual passion for the victim," would be an acceptable "other purpose[]" for which collateral misconduct could be offered.[115] Distinguishing the accused's "motive," which is "*always admissible*," from his or her "intent," which is "rarely applicable in prosecutions for first degree rape," the court concluded:

> Where . . . a defendant is charged with the first degree rape of *his minor daughter*, evidence establishing that he had raped and/or committed acts of *sexual abuse toward her* prior to or subsequent to the offense for which he is charged, is admissible to prove his *motive* in committing the charged offense.[116]

Additionally, the court addressed the issue of whether collateral acts of sexual abuse committed against the accused's *other children* were relevant to prove the accused's "motive" for allegedly raping the victim who is also his child, under circumstances where incest was not charged in the indictment.[117] Referring to this collateral evidence as "questionable,"[118] the Alabama Supreme Court held that when the third party against whom the collateral misconduct was committed is the defendant's child, the it may be more relevant in proving material "other purposes" than other third party offenses.[119]

After the Alabama Supreme Court's decision in *Bowden*, four conclusions could safely be drawn. First, the special treatment traditionally afforded collateral misconduct in sex offense prosecutions was arguably eradicated; instead, the same factors used to determine the admissibility of collateral acts in other prosecutions were to be applied in sexual offense prosecutions. Second, collateral acts of sexual mistreatment committed against the victim, would be relevant to prove the accused's "motive" for

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114. *Id.* at 1233.
115. *Id.* at 1234 (citing *Ex parte* Deason, 363 So. 2d 1001 (1978)).
116. *Id.* at 1235 (first and second emphasis added).
117. *Id.* at 1235-38.
118. *Bowden*, 538 So. 2d at 1235.
119. *Id.* at 1237.

committing the currently charged sex crime against that same victim. Third, when the third party against whom the collateral sexual acts were committed is the accused's child, it may be more relevant in proving material "other purposes" than evidence of other third party offenses would be. However, when incest is not charged in the indictment and the third party against whom the collateral sexual acts were committed is the accused's child, the use of "motive" as an "other purpose" would be "questionable."

Although the Alabama Supreme Court intended for *Bowden* to clarify the principles espoused in *Anonymous*, the decision resulted in more confusion and numerous unanswered questions. If the accused's "motive" is equivalent to his or her "sexual passion for the victim" and evidence of "motive" is "always admissible," is the court not adopting a very narrow form of the common law "lustful dispensation"[120] exception to the general exclusionary rule of character? Further, why is proof of "motive" questionable when offered in cases where the accused is not charged with incest? As pointed out by Justice Maddox in his powerful dissent in *Bowden*, "the defendant's motive at the time of the crime does not change with a prosecutor's decision to add an incest charge or not."[121] Rather, the dissent reasoned, if the accused is motivated by an abnormal desire to gratify his or herself and evidence tending to show this motivation is "always admissible," it would be illogical to arbitrarily limit its application.[122] Interestingly, the dissent not only argues that Alabama courts have traditionally liberalized the "other purposes" doctrine in sex offense prosecutions,[123] but it also argues that one's "motive" or "passion or propensity"[124] for gratification has long been allowed by Alabama courts *"as an exception to the general rule of exclusion."*[125]

2. Register & Hatcher.—After a series of dissenting opinions

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120. *See supra* text accompanying note 11.

121. *Bowden*, 538 So. 2d. at 1239 (emphasis omitted) (Maddox, J., concurring in part, dissenting in part).

122. *Id.* at 1240 (citing McLendon v. State, 8 So. 2d 883 (Ala. 1942)).

123. *See id.* at 1238.

124. *Id.*

125. *Id.* at 1238-39 (emphasis added).

criticizing the principles announced in *Bowden*, the pendulum of admissibility slowly swayed back toward the liberal admission of collateral misconduct evidence in sexual offense prosecutions.[126] In *Hatcher v. State*,[127] the defendant was convicted for the sexual abuse of his wife's ten-year-old sister.[128] During the course of the trial, over defense counsel's objection, the victim's sister testified that the defendant had also raped her.[129] Citing *Bowden* as authority, the Court of Criminal Appeals reversed the lower court decision stating that "the motive exception is not applicable to the present case, as this is not a situation involving incest."[130] The Alabama Supreme Court, however, reasoned that the holding in *Bowden* was not so restrictive as to make collateral acts of sexual misconduct inadmissible in *Hatcher* simply because the State had failed to charge incest.[131] Reiterating his dissent in *Bowden*, Justice Maddox concluded that because evidence tending to show "motive" is "always admissible"[132] and in the present case the defendant was "motivated" or "induced" by his unnatural desire for small children, the evidence of similar collateral misconduct was properly admitted.[133]

Two months after *Hatcher* was decided, the Alabama Supreme Court further retreated from its position in *Bowden* with its decision in *Ex parte Register*.[134] In *Ex parte Register*, the defendant was convicted of the sexual abuse and sodomy of his two minor stepdaughters.[135] During the course of trial, over defense counsel's objection, the prosecutor offered into evidence prior acts of sexual misconduct allegedly committed against the defendant's natural daughter.[136] The Alabama Supreme Court,

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126. *See e.g.*, Herman v. State, 571 So. 2d 345 (Ala. 1990) (Maddox, J., concurring); *see also* Hill v. State, 538 So. 2d 439 (Ala. 1988) (Steagall, J., dissenting).

127. 646 So. 2d 676 (Ala. 1994).

128. *Hatcher*, 646 So. 2d at 677.

129. *Id.*

130. *Id.* at 677-78 (quoting Hatcher v. State, 646 So. 2d 674, 676 (Ala. Crim. App. 1993)).

131. *Id.* at 678-79.

132. *Id.* at 679 (emphasis omitted) (citing McLendon v. State, 8 So. 2d 883 (Ak. 1942)).

133. *Hatcher*, 646 So. 2d at 680.

134. 680 So. 2d 225 (Ala. 1994).

135. *Register*, 680 So. 2d at 226.

136. *Id.*

apparently ignoring its language in *Bowden* to the contrary, stated that "courts seem more willing to admit evidence of collateral acts when sex crimes are involved, [and a] number of decisions have . . . approved [of] the introduction of evidence of the defendants [sic] sexual activity with persons other than the victim in carnal knowledge, rape, and incest cases."[137] Turning to the particular issue presented in *Ex parte Register*, the court questioned "whether evidence that a defendant has a *passion or propensity* for sexual misconduct is material and relevant as tending to establish the defendant's *motive* for perpetrating the crime for which he or she is being tried."[138] The Alabama Supreme Court answered this question in the affirmative and subsequently upheld the defendant's conviction.[139]

Based on dicta in *Ex parte Register*, one would reasonably conclude that the Alabama Supreme Court intended to revert to the pre-*Bowden* era of allowing greater latitude in proving relevant "other purposes" in sex offense prosecutions. Furthermore, even though *Hatcher* did not eliminate the requirement that the collateral acts must have been committed against a member of the family unit in order for "motive" evidence to be a viable "other purpose," it effectively extended the application of the "motive" doctrine beyond cases involving incest. For example, when collateral acts of sexual misconduct are committed either against the victim of the present prosecution or against a third party member of the accused's household, the collateral acts are "always admissible" to prove the accused's "motive" or "passion or propensity for sexual misconduct."[140] At this juncture, however, there remained an open question as to whether the Alabama Supreme Court would eventually determine that there is no sound basis for limiting the use of "motive" evidence to collateral sexual misconduct committed against members of the same family unit. If this next step were taken, would Alabama's use of the "motive" doctrine in sexual offense prosecutions be functionally equivalent to a "lustful dispensation" exception to

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137. *Id.* at 227 (quoting William A. Schroeder, *Evidentiary Use in Criminal Cases of Collateral Crimes and Acts: A Comparison of the Federal Rules and Alabama Law*, 35 ALA. L. REV. 241, 265-66 (1984)).

138. *Id.* (emphasis added).

139. *Id.* at 227-28.

140. *See supra* text accompanying notes 118-121, 127.

the general exclusionary rule of character?

3. Campbell & Estes.—With its 1997 decision in *Campbell v. State*,[141] the Court of Criminal Appeals picked up where the Alabama Supreme Court left off and further liberalized the use of the "motive" doctrine in order to accommodate the introduction of collateral acts of sexual misconduct committed against *unrelated third parties*.[142] In *Campbell*, the defendant, a middle school gym coach, was convicted for the sodomy, rape and sexual abuse of two of his young female students.[143] The trial court, over the defendant's objection, consolidated the two indictments for trial.[144] On appeal, the Court of Criminal Appeals sought to answer the following question: "If the offenses were tried separately, would evidence of each offense be admissible in the trial for the other offense?"[145] While recognizing that the most recent Alabama Supreme Court decisions allowing the introduction of collateral acts of sexual misconduct under the "motive" theory involved the molestation of the accused's children or stepchildren, the Court of Criminal Appeals reasoned that "the uniformity of precedent appears to indicate that in considering the relevance of one sex offense to show motive for another, the inquiry turns, not only on the similarity of the acts themselves, but also on the similarity of the relationships between the accused and the victims."[146] Upholding the consolidation of the two indictments and arguably endorsing a full-fledged "lustful dispensation exception," the Court of Criminal Appeals stated:

> In this case, the offenses committed by the appellant bear 'a resemblance,' . . . to each other and they could be used to show the appellant's motive, or his *unnatural lust for young female students* under his authority. Because evidence of *motive is always admissible* and because the evidence of the offenses 'had some tendency to show that [the appellant] had a *passion or propensity* for unusual and abnormal sexual relations,' [] we cannot say that

141. 718 So. 2d 123 (Ala. Crim. App. 1997).
142. *Campbell*, 718 So. 2d at 132.
143. *Id.* at 126.
144. *Id.* at 127.
145. *Id.* (quoting Yelder v. State, 630 So. 2d 92, 96 (Ala. Crim. App. 1991)).
146. *Id.* at 132.

> the trial court abused its discretion in allowing the admission of this evidence or in consolidating the indictments against the appellant into a single criminal trial.[147]

More recently, in *Estes v. State*,[148] the defendant was convicted and sentenced to ten years imprisonment for the sexual abuse of his eleven-year-old step daughter.[149] During the course of the trial, over defense counsel's objection, the trial court permitted the victim's friend to relate an occurrence in which the defendant allegedly sexually abused her as well.[150] On appeal, the defendant argued that the lower court violated the general exclusionary rule of character by allowing the victim's friend to testify as to his alleged collateral acts of sexual misconduct.[151] While recognizing that "a prior act of sexual abuse would [ordinarily] be inadmissible under Rule 404(b),"[152] the Court of Criminal Appeals reasoned that the collateral misconduct in this particular case "was offered for the specific purpose of proving motive."[153] In fact, the court held that "the offenses committed by [the defendant] are so similar that a jury could have concluded that [the defendant] is motivated by an *unnatural sexual desire for young girls*."[154]

The holding and reasoning of the Court of Criminal Appeals in both *Campbell* and *Estes* was clearly foreshadowed by *Bowden* and its progeny. Therefore, at this point in the evolution of the admissibility of sexual misconduct evidence, it appears safe to conclude that Alabama courts have, at a very minimum, returned to a liberal interpretation of the "other purposes" doctrine. Moreover, it could be persuasively argued that, by equating one's "motive" with his or her "passion or propensity" for abnormal sexual relations and sanctioning the use of the motive doctrine in situations where the victims of collateral misconduct

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147. *Campbell*, 718 So. 2d at 132 (citations omitted) (quoting *Ex parte* Register, 680 So. 2d 225, 228 (Ala. 1994)).

148. No. CR-98-0677, 1999 WL 1128991 (Ala. Crim. App. Dec. 10, 1999).

149. *Estes*, 1999 WL 1128991, at *1.

150. *Id.* at *2.

151. *Id.* (citations omitted).

152. *Id.*

153. *Id.*

154. *Estes*, 1999 WL 1128991, at *3 (citing Worthy v. State, 724 So. 2d 55 (Ala. Crim. App. 1998)) (emphasis added).

are outside of the family unit, a "lustful dispensation" exception to the general exclusionary rule of character is alive and well in Alabama. As demonstrated by the outcome in *Campbell* and *Estes*, this awkward exception to the general exclusionary rule liberalizes the admissibility of collateral sexual misconduct evidence and, therefore, will likely enhance the successful prosecution of sexual deviants. Manipulating the 404(b) "motive" doctrine to achieve this desired result, however, is problematic. For instance, as mentioned above, pursuant to Rule 404(b), evidence of prior bad acts is not admissible for the sole purpose of proving the defendant's criminal disposition.[155] Such evidence is admissible, however, to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[156] If a defendant's prior acts of misconduct are admissible to prove his or her "passion or propensity" for sexual misconduct, as is currently the case in Alabama, those bad acts are *not offered* for *another purpose* such as "motive." Instead, under the guise of "motive," the prosecution is doing exactly what Rule 404(b) prohibits—the injection of character evidence to show conformity.

In addition to being confusing and in direct opposition to the clear intent of Rule 404(b), Alabama's recent trend of equating one's "motive" with his or her "passion or propensity" for sexual deviance also renders a defendant's right to a Rule 105 limiting instruction meaningless. Pursuant to Rule 105, when an item of offered evidence is inadmissible for one broad purpose but admissible for one or more limited purposes, upon request, the court "shall" instruct the jury to consider the evidence only for its permissible purpose(s).[157] According to Professor Gamble, this instruction would preferably consist of two parts which "caution[] the jury both as to the limited purpose for which the evidence is admitted and the purpose or purposes for which they may not use the evidence."[158] By way of example, assume that Y discovers that his co-worker, X, has been embezzling money from their employer, Z corporation, for several years. Fearful

155. *Id.* at *2; ALA. R. EVID. 404(b).

156. ALA. R. EVID. 404(b).

157. *See* GAMBLE, *supra* note 41, § 12.01(2); *see also* ALA. R. EVID. 102, FED. R. EVID. 102.

158. GAMBLE, *supra* note 41, § 69.01(1).

that Y will notify Z corporation of X's misconduct, an action that would likely result in X's dismissal and imprisonment, X decides to murder Y. During X's murder trial, the prosecution offers evidence of his collateral embezzlement, via Rule 404(b), in order to prove X's "motive" for killing Y. Because X's attorney does not want the jury to infer guilt based on X's prior misconduct, he or she should request a Rule 105 instruction limiting evidence of X's collateral "bad act" to its proper scope. Such an instruction would likely provide as follows:

> Ladies and Gentlemen of the jury: You have heard testimony as to the defendant's collateral act of embezzlement. I want to caution you, you may use this testimony, if you believe it, to conclude that the defendant's desire to conceal his theft from his employer "motivated" him to commit the crime for which he is now charged. This evidence may not be utilized to infer that the defendant is of a bad character and acted in conformity with that bad character and committed the now charged crime.

With this instruction, at least in theory, the jury is certainly aware of both the permissible and impermissible purposes for which the collateral misconduct may be used. However, as applied to sex crime prosecutions within the state of Alabama, it is difficult to imagine how evidence of one's "motive" can be properly restricted in scope when "motive" is equated with one's "passion or propensity" for sexual deviance. For example, if X were on trial for the sexual molestation of Y and the prosecution offered a collateral act of sexual abuse committed against her friend Z in order to prove X's 404(b) "motive," the jury instruction would likely read as follows:

> Ladies and Gentleman of the jury: You have heard testimony as to the defendant's prior acts of sexual misconduct. I want to caution you, you may use this testimony, if you believe it, to conclude that the defendant's "passion or propensity" for abnormal sexual relations "motivated" him to commit the crime for which he is now charged. This testimony may not be used to infer that the defendant has a sexually deviant character and conformed with that character and committed the sexual offense for which he is now charged.

In contrast to the first instruction, because "propensity" evidence and "conformity" evidence are synonymous, the limiting instruction set forth above is both confusing and meaningless. How can

a jury use prior sexual encounters to infer that the defendant's *propensity* for sexual misconduct *motivated* him to commit the sex crime for which he is now charged and, thereafter, refrain from inferring that the defendant acted in keeping with his deviant character? Of course, a jury simply cannot.

D. The New Federal Rules: Propensity Evidence Allowed in Sex Offense Prosecutions

In contrast to Alabama's confusing manipulation of the "motive" theory in order to protect citizens from sexual predators, pursuant to the Violent Crime Control and Law Enforcement Act,[159] Congress completed the evolution in this area of evidence law by promulgating a series of straightforward amendments to the Federal Rules of Evidence. The first of these Rules, Rule 413, provides that in prosecutions for sexual assault, "evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."[160] Rule 414 provides a parallel principle for collateral acts of child molestation, and Rule 415 makes Rule 413 and Rule 414 applicable in civil actions.[161] Therefore, in sexual assault or child molestation prosecutions, Rule 413 and Rule 414, respectively, supersede Rule 404(b)'s prohibition against offering evidence of character in order to show that an accused had the propensity to commit the charged act.[162] For example, suppose a defendant is charged with sexually abusing a child. Rule 413, as an exception to the general exclusionary rule, allows the prosecution to introduce similar collateral incidences of sexual abuse committed against a third party for the sole purpose of showing the defendant's propensity ("lustful dispensation") to commit the now charged crime.[163]

Although comprehensively addressed elsewhere,[164] a few of

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159. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(c), 108 Stat. 1796, 2135 (codified at 42 U.S.C. §§ 13701-14233 (1994)).

160. FED. R. EVID. 413(a).

161. FED. R. EVID. 414, 415.

162. WEINSTIEN & BERGER, *supra* note 2, § 413.01[1].

163. FED. R. EVID. 413(a).

164. *See* Aluise, *supra* note 13, at 160-164; *see also* Lisa M. Segal, *The Admis-*

the compelling justifications for the abandonment of the general exclusionary rule in sexual offense prosecutions should be mentioned. First, the new Rules reflect "intellectual honesty" in that courts traditionally have been very liberal in the admission of collateral misconduct evidence in cases involving sexual assault or child molestation.[165] Second, in contrast to the inconsistent approaches adopted by common law courts in attempts to accommodate the admission of collateral acts of sexual misconduct,[166] the new Rules provide a uniform and straightforward mechanism for determining the admissibility of such evidence.[167] In fact, with the widespread adoption of state evidence codes modeled after the Federal Rules of Evidence, the need for uniformity only has been magnified.[168] For example, suppose a jurisdiction has long recognized a "lustful dispensation" exception for collateral misconduct in sex crime prosecutions. If this particular jurisdiction subsequently decides to model its evidence code after the Federal Rules of Evidence, its "lustful dispensation" exception arguably will not survive the adoption of Rule 404(b).[169]

Besides the promotion of accurate fact-finding and uniform results, the adoption of new Federal Rules 413, 414 and 415 can also be justified on policy grounds. First, while it was traditionally assumed that a person's character traits have little value in predicting his or her conduct, that assumption, referred to as situationism, has recently been called into question.[170] In contrast to situationism—the dominant theory when the Federal Rules of Evidence were drafted—many psychologists currently support the theory of interactionism.[171] According to interactionsim, "when there is a sufficiently large sample of the

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sibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception, 29 SUFFOLK U. L. REV. 515, 537 (1995).

165. Violent Crime Control Act of 1991, 137 CONG. REC. S3212, S3238-S3242 (daily ed. Mar. 13, 1991).

166. *See supra* text accompanying notes 61-76.

167. *See* FED. R. EVID. 413, 414, & 415.

168. Violent Crime Control Act of 1991, 137 CONG. REC. S3212, S3238-S3242 (daily ed. Mar. 13, 1991).

169. Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1127 (1993).

170. *See* Imwinkelried, *supra* note 9, at 286.

171. *See id.*

person's conduct in similar situations, on the average, the person's behavior in analogous settings can be forecast."[172] While this Note cannot even begin to scratch the surface of human behaviorial science, it is sufficient to say that supporters of the new Federal Rules believe that evidence of collateral sexual misconduct is highly probative in the prosecutions of sexual assault and child molestation.[173]

More important than the highly probative value of collateral sexual misconduct evidence, however, is the crucial role such evidence plays in the successful prosecution of sexual offenders.[174] In fact, due to the secretive nature of sexual offenses and the reluctance of victims to report such crimes, a neutral witness to the offense is unavailable in most instances.[175] Therefore, without the introduction of supporting collateral evidence, sexual offense prosecutions will often be reduced to "unresolvable swearing matches" between the accused and the victim.[176] As stated by one commentator, "[i]n many [sexual offense] cases, the only available supporting evidence comes from the pattern of the defendant's attacks."[177] Finally, the new Federal Rules provide sufficient safeguards to protect the defendant.[178] For instance, the collateral evidence must be relevant to some material issue in the case, and the probative value of such evidence must not be outweighed by its prejudicial effect.[179] Similarly, a prosecutor, or a plaintiff in a civil case, must disclose to a defendant the nature of the collateral sexual misconduct at least fifteen days before the scheduled date of trial.[180] Based in part on these procedural safeguards, federal

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172. *Id.* at 286-87.

173. *See* Aluise, *supra* note 13, at 160-71.

174. *See* Segal, *supra* note 164, at 534 (citing *Comprehensive Violent Crime Control Act of 1991, Hearings before the Senate Judiciary Comm.*, 102d Cong. 100 (1991)).

175. Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145, 165.

176. *Id.*; *see* Segal, *supra* note 164, at 538.

177. *See* Cassell, *supra* note 175, at 166.

178. WEINSTIEN & BERGER, *supra* note 2, § 413.04[2].

179. *See* United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997) (recognizing that Rule 403's balancing test applies to evidence admitted pursuant to new Rule 414).

180. For criticisms of new Federal Rules 413, 414 & 415, see Aluise, *supra* note

courts have consistently upheld the constitutionality of the new Federal Rules.[181]

IV. CONCLUSION

Over the course of the last fifteen years, as public outrage against sexual predators has steadily increased, Alabama courts have struggled to permit the admission of highly probative propensity evidence in sexual offense prosecutions. The most recent scheme—tampering with the non-conformity theory of "motive" in order to create an awkward exception to the general exclusionary rule—is not a viable solution to Alabama's problem. First, the Court of Criminal Appeals' expansion of the "motive" doctrine to the point where it is functionally indistinguishable from a "lustful dispensation" exception cannot survive Alabama's adoption of an evidence code modeled after the Federal Rules.[182] This point is perhaps best illustrated by the fact that our federal counterparts have recognized that the feasibility of a "lustful dispensation" exception hinged upon the adoption of three new Federal Rules: 413, 414 and 415. To hold otherwise, as did the Alabama Court of Criminal Appeals in *Campbell* and *Estes*, creates an "other purpose" that swallows the general exclusionary rule.[183] Second, and somewhat related to the above proposition, allowing the introduction of conformity evidence under the subterfuge of "motive" is unfair to the criminal defendant in that it renders his or her right to a limiting instruction meaningless.[184]

Although the Alabama Supreme Court denied certiorari in *Campbell*, the Court of Criminal Appeals recent decision in *Estes* may once again placed the Alabama Supreme Court in the

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13, at 165-66; Imwinkelried, *supra* note 9, at 285-94; Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L. J. 1 (1996).

181. *See* United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998); United States v. Castillo, 140 F.3d 874 (10th Cir. 1998).

182. Violent Crime Control Act of 1991, 137 CONG. REC. S3212, S3238-S3242 (daily ed. Mar. 13, 1991).

183. *See* Imwinkelried, *supra* note 169, at 1127 (suggesting that "cases espousing the lustful dispensation doctrine are arguably no longer good law in the states which have adopted Rule 404(b)").

184. *See supra* text accompanying notes 157-58.

unique position of having to reconsider its odd configuration of the "motive" doctrine and simultaneously to contemplate the adoption of the new Federal Rules. Since Alabama courts have apparently overcome the initial hurdle of acknowledging the extremely high probative value of propensity evidence in sexual offense prosecutions, the Alabama Supreme Court and the Advisory Committee should yield to "intellectual honesty" and adopt the straightforward, logical approach of Federal Rules 413, 414 and 415. Doing so would eliminate Alabama's confusing manipulation of the "motive" doctrine in sex crime prosecutions, align Alabama with its federal counterpart, and help ensure the successful prosecution of child molesters and other sexual offenders.

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